APPEAL FROM THE COURT FOR NATIVE AFFAIRS, RABAUL.

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TIUT

Appellant

and

TOWATO

Respondent

JUDGMENT READ BY PHILLIPS, C.J. ON MONDAY THE 28th DAY OF MAY, 1956.

In this appeal Tiut has appealed against his conviction, on the 3rd of February last, by a Court for Native Affairs holden at Rabaul in the Territory of New Guinea. Mr. Clay of counsel has represented the appellant at the hearing of the appeal, but there has been no appearance by or for the respondent.

According to the copy of the record of the proceedings at the lower Court, furnished by it to this Court, the charge against Tiut was:- "That at Reimber on the 16th of October, 1955, he being a native resident within the area of the Reimber Native Village Council failed to comply with Rule Certificate No. 12 of the said Council, to wit, without reasonable excuse failed to pay his tax. Contra Sec. 15(1) N.V.C. Ord. 1949." The letters and figures "N.V.C. Ord. 1949" appearing at the end of that charge are an obvious abbreviation of "Native Village Councils Ordinance 1949," an Ordinance which has, since the passing of Ordinance No. 4 of 1954, come to be known as the Native Local Government Councils Ordinance 1949-1955. For brevity I shall hereinafter refer to that Ordinance as the "Councils Ordinance" and to the Regulations made under it as the "Councils Regulations."

To understand the charge, it is necessary to look at the Councils Ordinance, the Councils Regulations and, of course, the Reimber Council's Rule No. 12. A study of the Ordinance shows that it was the intention of the legislature to grant limited powers of self-government to Councils established under the Ordinance and to see that those Councils had funds to enable them to carry out their statutory duties. Thus Section 19 of the Ordinance, in its original form, gave such a Council power to "levy rates and taxes to be paid by natives within its area." That Section was amended (after the Reimber Council had made Rule No. 12) by Ordinance No. 5 of 1955 in a way that gave such a Council power to "impose, collect and levy, in such manner as is prescribed, rates and taxes to be paid by Natives within its area," but that amendment was made retroactive to the 30th of December, 1949. Part V of the Councils Regulations relates to Council Taxation and has provisions prescribing when and how Council Tax shall be collected, by whom and at what rates it shall be paid, penalties for non-payment of tax, exemptions from tax, etc. Regulation 80 prescribes that the tax payable annually by natives residing within a Council's area shall be decided by the Council in consultation with the District Officer or his representative and shall be imposed by a Rule made and promulgated in the same manner as any other rule

of the Council. On the 9th of October, 1954, the Reimber Council had made a Rule, Rule No. 12, which imposed Council Tax for the financial year 1955; and that Rule had been approved by the District Commissioner of New Britain. Paragraph 6 of that Rule said: "Any person who fails to pay tax without reasonable excuse shall be liable to a penalty provided for contravening or failing to comply with a Rule made under Section 15 of the Native Village Councils Ordinance 1949." It may be observed that Section 15 of the Ordinance was not the section that empowered Councils to make Rules, but it seems reasonably clear that what the Council meant to say in paragraph 6 of the Rule was that any person who failed to pay tax without reasonable excuse should be liable to a penalty provided in Section 15 of the Ordinance for contravening or failing to comply with a Rule made under the Ordinance. Paragraph 7 of the Reimber Council's Rule No. 12 was as follows:- "All Council Tax for the financial year 1955 shall be paid by the thirtieth day of April 1955." Section 15(1) of the Councils Ordinance makes it an offence for a native, without reasonable excuse, to contravene or fail to comply with any rule made under that Ordinance which is applicable to him, and prescribes for such an offence a penalty of £5 or imprisonment for one month, or both.

Thus the charge preferred against Tiut on the 17th of October, 1955, amounted to this:- he was charged under Section 15(1) of the Councils Ordinance with having, at Reimber on the previous day, failed to comply with the Reimber Council's Rule No. 12, in that, without reasonable excuse, he had failed to pay the Council Tax for 1955 which had been imposed by Rule No. 12, and which, because of paragraph 7 of Rule No. 12, he should have paid by the 30th of April, 1955.

That charge against Tiut was not finally disposed of by the lower Court at Rabaul on the 17th of October, 1955, because Tiut sought and obtained an adjournment. There were several more adjournments before the 6th of December, 1955, on which day Mr. James, learned counsel appearing for Tiut, submitted that the charge should be dismissed because Tiut had already been convicted of the same charge as he was then facing. According to the record from the lower Court, itwas not disputed, on the 6th of December, 1955, that Tiut had previously been convicted of the same offence as that on which he then stood charged. Counsel for the defence (Mr. James), the officer appearing for the prosecution (Mr. Williamson), and the Magistrate himself (Mr. Hall), all of them agreed that Tiut had been convicted on three earlier occasions of the same offence against Section 15(1) of the Councils Ordinance, namely, failure to comply with Rule 12 of the Reimber Council, - the first occasion being on the 9th of June, 1955, when he was "convicted and adjudged to pay a fine of £1 and in default of payment of fine to be imprisoned for a period of 14 days," the second occasion being on the 27th of June, 1955, when he was "convicted and adjudged to be imprisoned in the gaol at Rabaul for one month," and the third occasion being on the 2nd of September, 1955, when he was "sentenced to one month in hard labour at Rabaul gaol."

Mr. James vigorously submitted that in these circumstances the plea of autrefois convict should be accepted and the charge should be dismissed. He referred to the general principle of the Common Law that no man should be put twice in peril for the same offence. He also referred to Sections 16 and 17 of the Queensland Criminal Code (adopted), the relevant portions of which are as follows:- Section 16 - "A person cannot be twice punished .... for the same act or omission ....": Section 17 - "It is a defence to a charge of any offence to show that the accused person has already been tried, and .... convicted, of an offence of which he might be convicted upon the .... complaint on which he is charged." Mr. James also pointed out that a conviction for failure to pay Council Tax still left it open to the Council concerned to sue

the convicted person for the amount of the unpaid tax as for a debt: and in that connection he referred to two new Regulations that, inter alia, had been incorporated in the Councils Regulations by Statutory Rule No. 2 of 1955. Those Regulations were Regulations 81 and 81A, which read as follows:-

"81.(1) A Native liable to pay Council Tax shall not, without reasonable cause, proof whereof lies upon him, refuse or fail to pay the tax.

(2) A conviction of an offence against the last preceding sub-regulation does not relieve the offender from the liability to pay the tax.

81A. Council Tax due to a Council may be recovered by the Council as a debt due to it."

Mr. James's reference to Regulations 81 and 81A appears to have led Mr. Williamson and the Magistrate to devote their main attention to those two Regulations: for the rest of that sitting, they made no reference at all to Section 15(1) of the Councils Ordinance under which the charge against Tiut had been preferred.

Mr. Williamson submitted that Regulation 81(2) showed that Tiut's failure to pay tax was "a continuing offence" and therefore that "on the day laid down in the Rule" (30th of April, 1955) "the defendant was due to pay his tax" and "every succeeding day in which he (was) due to pay his tax (constituted) a fresh offence under the Rule." He further submitted that, if the plea of autrefois convict were upheld, this would "nullify the whole purpose and intention" of the Councils Ordinance, the object of which was (he said) "to implement as quickly as possible a system of local self-government for the native people, including a comprehensive development and welfare programme": That submission seems to me to exaggerate grossly any probable result of an acceptance of Tiut's plea of autrefois convict, but possibly it was made in a moment of forensic fervour.

The Magistrate, ruling on the plea of autrefois convict, began by saying:- "The whole of this case with regard to this plea of autrefois convict turns on the interpretation of Regulation 81, sub-section 2 of Statutory Rule No. 2 of 1955." There, I think, the Magistrate was in error because the question with which he was at that moment concerned was whether he should sustain or reject the plea that Tiut had already been convicted of the same offence as that on which he then stood charged, and the offence of which he then stood charged was an offence against Section 15(1) of the Councils Ordinance, not an offence under Regulation 81 of the Councils Regulations.

The Magistrate went on to say:- "It is a well known principle that statutory provisions over-ride the Common Law, and it is purely a matter of interpretation": and he then proceeded to interpret Regulations 81 and 81A, saying nothing about Section 15(1) of the Ordinance. Although I feel that the Magistrate strayed from the matter in hand in making some of the observations he did make on Regulations 81 and 81A, I propose to comment on those observations for two reasons:- partly because silence on my part might possibly be interpreted as agreement with what he said, and partly because it is conceivable that the Magistrate considered that what he said about Regulations 81 and 81A applied also to Section 15(1) of the Councils Ordinance, though nowhere did he expressly say so. The Magistrate noted that Regulation 81(2) provided that a conviction of an offence against Regulation 81(1) did not "relieve the offender from the liability to pay the tax." As to the meaning to be given to the word "liability" in that context, the Magistrate said that it was obvious "from"

Section 81(1)" - clearly he meant Regulation 81(1) - that "it is an offence, not a mere civil liability for a native to fail to pay tax without reasonable cause, and in my opinion the particular word 'offence' and 'offender' govern the general word 'liability,' and by the application of the ejusdem generis rule the only possible interpretation of that word can be 'criminal liability.'" That passage discloses a misapprehension on his part as to the nature and the application of the ejusdem generis rule. It is well established that, unless there is a genus or category, there is no room for the application of the ejusdem generis doctrine: see Tillmans & Co. v. S.S. "Knutsford", (1908) 2 K.B., p. 385, 403; (1908) A.C. 207. An act or omission in breach of a duty or liability is quite a different thing from the duty or liability itself; and, as "offence" and "offender" are not within the same genus or category as "liability," there was no room for the application of the ejusdem generis rule to those words in Regulation 81(2). In short, it was a mistake to suppose that the ejusdem generis rule provided a justification for tacking the word "criminal" on to the word "liability." The Magistrate also stated that he considered that Regulation 81(2) made the liability to pay tax a "continuous" criminal liability; and he put the rhetorical question:- "If that had not been the intention of the Regulations wherein lay a necessity for (Regulation) 81A?" I think that there was a non sequitur there; and that the Magistrate overlooked or did not consider another interpretation of Regulation 81(2) that was clearly open, namely, that the conviction of a person under Regulation 81(1) for failing to pay tax could not be set up by him as freeing him from all liability to pay the tax; on the contrary, he was still liable, notwithstanding his conviction, to pay the tax and, as Regulation 81A made clear, his Council could still sue him for his unpaid tax as for a debt.

On the 6th of December last, therefore, the lower Court, holding that failure to pay tax was a "continuing offence," rejected Tiut's plea of autrefois convict and his plea under Section 16 of the Criminal Code. At that stage the proceedings were adjourned: and later on, they were again adjourned until the 3rd of February, 1956.

On the 3rd of February, 1956, more or less formal oral evidence was given about the making of Rule 12, about Tiut's liability to pay the Council Tax imposed by that Rule, etc. (I think I am right in saying that Tiut has never challenged the validity of the Reimber Council's Rule No. 12). Mr. James raised the pointwhether a direct demand and a direct refusal were necessary to constitute a failure to pay tax. The Magistrate disposed of that submission by saying:- "I rely on the Section which states that the onus of proof of either the payment or the reasonable excuse rests entirely with the defendant, and I cannot construe either the Ordinance or the Regulations to shift that onus of proof to the Council or the informent in this case." In actual fact, Section 15(1) of the Councils Ordinance, under which Tiut then stood charged, says nothing about any onus of proof being on the defendant: Regulation 81(1) purports to put upon a defendant the onus of proving that there was no reasonable excuse for failing to pay tax, but Tiut was not then being charged under that sub-Regulation. Mr. James also raised the question whether, in view of the fact that Tiut had paid £1 of the £4 tax that the Reimber Council had levied in Rule No. 12, he could properly be said to have failed to pay the Council Tax. The Magistrate held, (rightly, I think), that there was a failure to pay Council Tax if all of it was not paid. In the end, the Magistrate, holding that the tax referred to in the Reimber Council's Rule No. 12 had not been paid by Tiut, found him guilty of the charge and sentenced him to one month's imprisonment with hard labour: but a stay of proceedings was granted upon the defendant's entering into a recognizance to prosecute this appeal.

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Tiut has now appealed against that conviction on

several grounds;- first, that he had already been tried and convicted of the same offence: secondly, that he had already been punished for the same act or omission: thirdly, that the Court for Native Affairs erred in law (a) in holding that he could be twice convicted for failing to pay the same sum of tax; and (b) in holding that "Section 81(2) of the said Ordinance is a Section making the liability a criminal one and a continuous criminal liability"; and (c) in rejecting his plea of autrefois convict. (The reference, in paragraph 3(b) of the Notice of Appeal, to "Section 81(2) of the said Ordinance" followed the words used by the Magistrate at the lower Court: those were a slip, since there is no Section 81(2) in the Ordinance, and obviously Regulation 81(2) was what was meant).

Whether or not the Common Law rule in regard to autrefois convict was introduced into the Territory of New Guinea by Section 16 of the Laws Repeal and Adopting Ordinance, there is the express provision in Section 17 of the Queensland Criminal Code (adopted) that autrefois convict is a defence to a charge of any offence. The word "offence," as used in Section 17 of the Code, has the widest connotation, for it is defined in Section 2 of the Code as "an act or omission which renders the person doing the act or making the omission liable to punishment." Section 16 of the Code covers different ground from that covered by Section 17 and provides that a person cannot, except in one instance not now relevant, be twice punished for the same act or omission.

In the present case, as already mentioned, the lower Court took the view that the defence of autrefois convict or a plea under Section 16 of the Code was not open to Tiut because, in the Magistrate's opinion, the relevant legislation had made failure to pay Council Tax not only an offence but also what he described as a "continuing offence."

Mr. Clay, learned counsel for the appellant, referred to a number of cases in which the meaning of the words "continuing offence" had been considered. It was manifest from those authorities that the words "continuing offence" have sometimes been used as meaning one thing and have at other times been used as meaning another thing. Thus, in J. Robins & Sons Ltd. v. Maloney (No. 2), 1935 A.R. (N.S.W.), p. 155, at pp. 157-158, it was said:- "Continuing offences .... may be divided into two classes - (1) those in respect of which a separate penalty may be inflicted for each day the offence continues, as if for a separate offence, and (2) those where the duty of obedience, failure to perform which is the offence, continues until the duty is performed .... Of course, every offence created by law is not a continuing offence, and whether an offence be a continuing offence or not, and if it is, whether it falls within the first or second class mentioned, can only be determined in each instance by a consideration of the language of the instrument by which the offence is created. As regards those within the first class, it is sufficient to say that it will be found that usually the statute itself imposes a penalty for each day the offence continues," (or, it might be added, gives some other clear indication).

Now it is plain that when the Magistrate convicted Tiut on the 3rd of February last of what he described as a "continuing offence," he regarded failure by a person to pay Council Tax as an offence that went on from day to day and as an offence for which that person might be repeatedly prosecuted - notwithstanding earlier convictions for the same offence.

The question, then, is:- Was the Magistrate correct in that view? The answer to that question depends on the language used in the relevant legislation (including any relevant subordinate legislation). It used to be said that taxing and penal statutes had to be "strictly construed," but it is now well established that such statutes are to be construed in accordance with the same rules of construction as

other statutes are. They must, as has been said, be "fairly construed according to the legislative intent as expressed in the enactment." In the case, Cape Brandy Syndicate v. Inland Revenue Commissioners, (1921) 1 K.B., 64, Rowlatt, J., said:- "In a taxing Act one has to look at what is clearly said. There is no room for any intendment .... Nothing is to be read in. Nothing is to be implied. One can only look fairly at the language used." That statement was approved in the House of Lords in Canadian Eagle Oil Company v. The King, (1946) A.C. 119, 140. In a Privy Council case that has more than once been cited with approval by the High Court of Australia, The Gauntlet, (1872) L.R., 4 P.C., 184, the Judicial Committee said that the Courts, when construing penal statutes, "must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip," or that there has been an omission, or "that the thing is so clearly within the mischief that it must have been intended to be included, and would have been included if thought of .... But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of the penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument." If, however, on the fair and common-sense construction of a taxing or penal provision, ambiguity remains, the subject must be given the benefit of the doubt: Attorney-General v. The Earl of Selborne, (1902) 1 K.B., 388: Ingham v. Hic Lee, 15 C.L.R., 267.

Bearing those principles of construction in mind, it is now my duty to apply them in this case. Section 15(1) of the Councils Ordinance, under which Tiut was charged, made it an offence, punishable with a penalty of £5 or imprisonment for one month, or both, for a native, "without reasonable excuse," to "contravene or fail to comply with any rule made under (that) Ordinance which is applicable to him." The Rule referred to in the charge against Tiut was Rule No. 12, made by the Reimber Council on the 9th of October, 1954, - a Rule imposing Council Tax for the financial year 1955. It has not been suggested, on behalf of Tiut, that Rule No. 12 was invalid or that he was not liable to pay the Tax imposed by it; but it has been contended that he should not have been convicted more than once for failing to comply with that Rule. As already noted, paragraph 6 of that Rule made failure without reasonable excuse to pay Council Tax subject to a penalty, namely, a penalty prescribed in Section 15(1) of the Councils Ordinance; and paragraph 7 of that Rule very clearly stated that "All Council Tax for the financial year 1955 shall be paid by the 30th day of April, 1955." The plain meaning of those paragraphs was, in my opinion, that if a person liable to pay the Council Tax imposed by that Rule had, without reasonable excuse, failed to pay his 1955 Tax by the 30th of April, 1955, he had failed to comply with the Rule: in other words, his non-compliance with the Rule was complete as soon as the 30th of April, 1955, had passed. Therefore, on the 1st of May, 1955, his Council could have prosecuted him under Section 15(1) of the Councils Ordinance for that non-compliance. If, however, the Council had not done anything about the matter and he still, without reasonable excuse, had not paid his 1955 Council Tax by, let us say, the 1st of August, 1955, or by

/Some other

some other date within any statutory period of limitation, then his offence would be a "continuing" one in the sense that it would still be open to his Council to launch a prosecution against him for non-compliance with Rule No. 12, the "continuing" non-compliance that had begun when he had not paid his Council Tax by the 30th of April, 1955. But that is quite a different thing from saying that his Council could rightly have prosecuted him again and again during that period for having failed to comply with Rule No. 12. Repeated convictions for failure to comply with the Rule would not be lawfully permissible unless they were authorised by clear words or by the relevant legislation. Are there such words? In the Reimber Council's Rule No. 12 there is no reference to any penalty except one under Section 15(1) of the Councils Ordinance: the Rule does not say that every day's non-payment of Council Tax for 1955, after the 30th of April, 1955, should constitute a fresh non-compliance with the Rule and be subject to a penalty. Section 15(1) of the Councils Ordinance makes it an offence to "fail to comply" with a rule such as the Reimber Council's Rule No. 12. But it will be noted that the words used in Section 15(1) are - "fail to comply with any rule," and that that sub-section does not expressly say, for example, that it shall also be an offence to "continue to fail to comply with any rule" or that "every day's failure to comply with a rule shall constitute a separate offence:" in my opinion, the rules of construction do not permit me to read phrases of that kind into the words, "fail to comply with," now appearing in the sub-section. As we have seen, the lower Court took the view that Regulation 81(2) indicated that a person could be repeatedly convicted for having failed to pay the same annual Council Tax. Such a construction of that sub-regulation is, in my opinion, a distortion of the plain meaning of the clear words used in that sub-regulation. The plain meaning of those words is, that a person's conviction under Regulation 81(1) for failure to pay a particular Council Tax does not wipe out his obligation to pay that tax, and, as Regulation 81A shows, if he fails to honour that obligation, his Council may sue him for his unpaid tax as for a debt. (Compare Sections 207, 208 and 209 of the Commonwealth's Income Tax and Social Services Contributions Assessment Act). In my view, the words used in Regulation 81(2), given their ordinary common-sense meaning, do not authorise repeated convictions for failure to pay the same Council Tax: before the sub-regulation could have such an effect, cogent words would have to be read into it that are not there now, and that is not permissible. The Magistrate read Regulation 81(2) as if it said that a conviction under Regulation 81(1) did not relieve the person convicted of a liability to be again convicted for failure to pay the tax. But Regulation 81(2) did not say that at all: it said that such a conviction did not relieve the person convicted of liability to pay the tax, i.e. of liability to pay his debt. In any case, Regulation 81(2) specifically refers to a "conviction of an offence under the last preceding sub-regulation," that is to say, to a conviction of an offence under Regulation 81(1): Tiut was not charged with an offence against Regulation 81(1) but was charged with an offence against Section 15(1) of the Councils Ordinance.

As I understand Section 15(1) of the Councils Ordinance, it furnished a sound foundation for Tiut's first prosecution on the 9th of June, 1955 for failure to comply with the Reimber Council's Rule No. 12: but when that prosecution ended in his conviction, the penal sanction provided in Section 15(1) for his non-compliance was thereby exhausted. To use that sub-section for the purpose of obtaining further convictions against Tiut for the same offence was a flagrant case of flogging a dead offence and a live defendant.

For the reasons I have given, this appeal must be upheld. I think that the lower Court should have accepted ....

Tiut's plea of "autrefois convict" and should have dismissed the charge against him. The lower Court did not do that. It convicted him and sentenced him to one month's imprisonment with hard labour but granted a stay pending this appeal. That conviction and sentence must be quashed, and I shall so order. I think the appellant should have his costs of this appeal.

F. B. PHILLIPS

CHIEF JUSTICE.